IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

MARGARET M. JOHNSON AND MARY E. LAYTON, DOING BUSINESS AS UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON,
Petitioners,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

1. The Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is at page 39 of the record. The District Court rendered no opinion but entered an order which is printed in the record at page 23.

2. Jurisdiction.

The petition sets forth, on page 2, the grounds on which jurisdiction is invoked.

3. Statement of the Case.

The petition sets forth an outline of the facts on page 2, under the caption, "Summary Statement of the Matters Involved." The facts are not in issue; only questions of law are involved.

4. Statutes Involved.

The Federal Denture Act (18 U.S.C.A. Sec. 420(f)) is quoted in full on page 3 of the petition. The applicable sections of the dentistry laws of Indiana, Michigan and Wisconsin are cited on page 4 of the petition.

5. Specification of Errors.

(1) The Circuit Court of Appeals for the Seventh Circuit denied the petitioners their constitutional right to engage in the lawful business of constructing dentures from self-taken impressions.

(2) The Circuit Court of Appeals erred in failing to pass upon defendants' contention that the dentistry laws of Indiana, Michigan and Wisconsin contain unconstitutional delegations of legislative authority under the Fourteenth Amendment by conferring upon dentists licensed under state law, without any standards to guide them, the power to legalize the manufacture of a denture, or to make such manufacture criminal.

(3) The Court neglected to consider defendants' contention that the Federal Denture Act, in which Congress delegated its legislative power over the mails and interstate commerce to private individuals without any standards for guidance, is in contravention of Article 1, Section 1 and the Fifth Amendment of the U. S. Constitution.

(4) The decision is in conflict with the principles established by this Court in the cases of *Schechter* v. *U. S.*, 295 U. S. 445 and *Carter* v. *Carter Coal Co.*, 298 U. S. 238, in which it was held that a federal statute is invalid if it attempts to regulate an occupation without specifying reasonable standards for the regulation thereof.

(5) The Court ignored the well recognized rule that a criminal statute must be so definite and clear as to apprise those accused of the nature of the acts prohibited.

ARGUMENT.

The constitutionality of the Federal Denture Act has never been tested before and it is important that this issue should be settled now by this Court. This Act has been before this Court upon the question whether venue under the Act exists in the District in which the denture is delivered through the mails: *U. S.* v. *Johnson et al*, 56 S. Ct. 249 (1944). It was decided there that such District is without venue.

I.

A. Petitioners may constitutionally construct dentures from self-taken impressions.

The Federal Denture Act becomes operative only upon the existence in a state law of the following prohibitions:

> "(1) the taking of impressions or casts of the human mouth or teeth by a person not licensed under the laws of such State or Territory to practice dentistry;

"(2) the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under the laws of such State or Territory to practice dentistry; or,

"(3) the construction or supply of dentures from impressions or casts made by a person not licensed under the laws of such State or Territory to practice dentistry."

The Circuit Court of Appeals stated the following sections of Indiana, Michigan, and Wisconsin dentistry laws were applicable:

Indiana Statute (Burns 1943) Sec. 63-522;

Michigan Public Acts, 1939, 122, Sec. 14.629;

Wisconsin Statutes, 1943, Sec. 152.02.

These state laws and subparagraph 1 of the Federal Denture Act, if literally construed, would prevent a person not licensed to practice dentistry from taking an impression of his own mouth or teeth. However, the Circuit Court of Appeals conceded for the purposes of the appeal "that no law which prohibits a person's making an impression of his own mouth could be constitutional" (Tr. 40). By interpretation, therefore, that Court excluded self-taken impressions from the purview of the state dentistry laws. Such interpretation was necessary to prevent the laws from being unconstitutional.

Similarly, the provisions of the state laws and subparagraph 2 of the Federal Denture Act concerning the construction of dentures by laymen cannot be literally construed, when self-taken impressions are in issue. The logical application of the Circuit Court's interpretation would permit the construction of dentures by a person other than, or without the authorization or prescription of, a licensed dentist if the dentures are constructed from impressions taken by persons of their own teeth or mouth.

A contrary interpretation denies petitioners their right to engage in a lawful business as guaranteed by the due process clause of the Fourteenth Amendment of the Federal Constitution.

Beaver Brook Resort Co. et al v. *Stevens,* 76 Colo. 131, 230 Pac. 121 (1924);

Meyer v. *Nebraska,* 262 U. S. 390, 399 (1923);

Prata Undertaking v. *State Board of Embalmers and Funeral Directors,* 155 R. I. 454, 182 Atl. 808 (1936);

State Board of Barber Examiners v. *Cloud,* 220 Ind. 552, 44 N.E. (2d) 972 (1942).

The attempted regulation of dental laboratories was passed in response to an economic pressure group, namely an organized body of licensed dentists. It is a well recognized fact that licensed dentists usually do not perform the laboratory work on dentures but send this work to skilled laboratory technicians in dental laboratories such as that operated by the defendants. The laboratory business has always been properly deemed to be outside, and separate from, the profession of dentistry which it serves. In prior years, the dentist was the only person from whom a denture could be procured, and his rates were relatively high for a large block of the people, particularly those living in rural areas. The result was that they either paid those high fees or they went toothless. With the inception of dental laboratories, such as that operated by the defendants, and direct dealings with the public, usually by mail, the public has been given an oportunity to secure dentures directly and at lower costs than had previously been available through the channels of the dentist. With this threat to their exclusive high fees, dentists sought legislation to prevent dental laboratories from dealing with the public. The courts have consistenly invalidated

laws which regulate a business on the pretext of advancing the public welfare, but which in reality advance the interest of a minority group.

State Board of Barber Examiners v. *Cloud,* 200 Ind. 552, 44 N.E. (2d) 972, 978 (1942).

State ex rel Booth v. *Beck Jewelry Enterprise,* 41 N.E. (2d) 622, 141 ALR 876 (Ind. 1942);

State v. *Cromwell,* 306 N. Dak. 356, 9 N.W. (2d) 914, 922 (1943).

B. The dentistry laws of Indiana, Michigan, and Wisconsin unlawfully permit private persons to determine what is a criminal act without any standards for guidance and are violative of the due process clause of the Fourteenth Amendment and the Sixth Amendment of the Federal Constitution.

The legislatures of Indiana, Michigan, and Wisconsin made no attempt to regulate dental laboratories or their work. The dentistry laws excluded from their purview dentures constructed upon the "order" or "prescription" of a licensed dentist. These states have granted the power to any individual licensed dentist to bring within, or to exclude from, the operation of the dentistry laws the work of any dental laboratory. Thus the business of the dental laboratory may be subject to, or be exempt from, the requirements of a dentistry license depending upon the dictates of any dentist. No standards or qualifications are specified in determining whether the work of a particular laboratory should be "prescribed" or not.

Such indefinite delegation of legislative power without standards has been held in many cases to be violative of the Fifth, Sixth, and Fourteenth Amendments:

Hoff v. *State of Delaware,* 39 Del. 134, 197 Atl. 75 (1938);

Seigneous v. *Rice*, 273 N.Y. 44, 6 N.E. (2d) 91 (1936);

Gibson Auto Co. v. *Finnegan*, 217 Wis. 401, 259 N.W. 420 (1935);

Connally v. *General Construction Co.*, 269 U. S. 385 (1926).

The *Van Keegan* case arose under a law prohibiting the sale of eyeglasses except under the supervision of a licensed optician and further provided that optical establishments of licensed opticians may sell glasses upon obtaining a permit from the Commission. The Connecticut court invalidated the statute on the ground that it unconstitutionally delegated legislative power to the Commission. The Court said:

> "Nowhere in the chapter are there any provisions as to the method of conducting the business which would limit the regulations. No sufficient guide for the exercise of the discretion reposed in the Commission has been set up. No standards for issuances of permits have been specified."

Statutes have been held invalid when they confer legislative power, without definite standards for guidance, over an occupation to a board or commission. This invalidity is still more apparent when the legislative power is conferred upon a private individual—the licensed dentist under the state dentistry laws.

II.

A. The Federal Denture Act unlawfully delegates legislative power to private persons.

The Federal Act goes much further than the State Acts of Indiana, Michigan, and Wisconsin. While the State Acts use the words "prescription", "order", or "di-

rections", the Federal statute has substituted the words "authorization or prescription". To "authorize" means "to clothe with authority, warrant or legal power, to give a right to act; to empower". The word "authority" has, among other synonyms, the words "power", "dominion", and "jurisdiction" (Webster's International Dictionary). It is evident, therefore, that regardless of the provisions of the State statutes, under the Federal statute no order, prescription or directions are required, nor need the delivery be to a licensed dentist. All the licensed dentist of one of these states needs to do to legalize the manufacture of dentures to be shipped into his own state is simply to advise the laboratory that it may or is permitted to go ahead with the construction, as this would be giving "the right to act" or "empowering".

The Federal statute here involved recognizes the competence of the laboratory to take the impression and to make and fit the denture, if it obtains the authorization of a dentist. It does not forbid laboratories from taking or receiving impressions. None of the acts are criminal if a dentist authorizes them, even though he in no other way participates either in taking the impression or in making and fitting the denture. The statute recognizes that these acts are not criminal if the dentist, without any degree of supervision on his part, permits their performance by the laboratory. No consideration need be given by the dentist to the method by which the impression was taken, to the question of by whom it was taken, to the standing or competence of the laboratory, or to the manner of manufacture. Indeed, no impression is required at all. The licensed dentist has unbridled discretion in the matter. It is respectfully submitted that this is an attempted delegation of legislative power without standards.

Schechter Poultry Corp. v. *U. S.*, 295 U. S. 495, 97 A.L.R. 947 (1935);

Carter v. *Carter Coal Co.*, 298 U. S. 238 (1935);
U. S. v. *Cohen Grocery Co.*, 255 U. S. 81 (1921).

In the *Schechter* case, Chief Justice Hughes said (pp. 537, 531):

> "Such delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.
>
> "It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. . . .".

In the case of *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1935), Justice Sutherland said (p. 311):

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form, for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business . . . a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property."
>
> "The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp.* v. *United States*, 295 U. S. at p. 537; *Eubank* v. *Richmond*, 226 U. S. 137, 143; *Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, 121-122."

This attempted delegation of authority to the licensed dentists of the States involves also an unlimited authority over what dentures shall be admitted to the mails or to the

channels of interstate commerce. The fact that the power is indirect, in other words, to be accomplished by refusing to authorize the manufacturer to construct dentures intended for shipment into his State, does not rob it of its significant feature—power in the hands of a private citizen to determine at his own will what shall and what shall not be mailed or shipped in interstate commerce. The law does not profess to provide how the plate shall be manufactured, the qualifications of the technician making it, the nature of the cast or impressions from which it is constructed, or the procedure which shall be followed in obtaining a fit. The sole requirement is that its manufacture must be authorized by a registered dentist of the State into which it is to be sent. A prescription is an alternative but not a requirement; the dentist need send no cast, no measurements, no direction—only an authorization.

The declaration of the Circuit Court of Appeals that the "Federal Government, under its interstate power, may aid such state legislation" and that its action for that purpose "is constitutionally unchallengeable" is unquestionably too broad. The Congress cannot adopt unconsitutional means to accomplish a purpose it deems worthy, otherwise the constitutionality of all federal legislation would be judged not by the statute itself but the purpose thereof, which is, of course, a legal absurdity.

B. The Federal Statute is unconstitutional because of its indefinite, vague and ambiguous nature.

Under the Federal Statute, it is clear that because of the delegation of power it contains, the same act may be legal or illegal depending upon whether it has been authorized or not authorized by a registered dentist who is not restricted by any rule or standard. Moreover, the Federal statute is not co-extensive with the State statutes; it allows

dentures to be made for shipment into States on the mere *authorization* of licensed dentists of such States without regard to State requirements relative to the taking of impressions, delivery to licensed dentists, orders or prescriptions or advertising to the public. The words of the prohibiting clause of the Federal Statute "constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed under the laws of" are quite ambiguous, since English construction would necessitate the conclusion that the phrase "without the authority or prescription of" related to "impressions"; but it may have been intended, as the Government contends, to relate back to the verb "constructed". Moreover, the applicability of the Federal Statute may depend upon what is covered by the reference in the State laws to the "curricula" of "recognized" schools and colleges, a very indefinite specification for a criminal statute.

This Court has held that "No one may be required at the peril of life, liberty, or property, to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids".

Lanzetta v. *N. J.*, 306 U. S. 451 (1939).

Very recently, the Connecticut Supreme Court in the case of *Connecticut* v. *Van Keegan* (Conn. Supreme Ct., decided April 16, 1945, 13 U. S. Law Week 2567) pointed out that a penal statute may be void for indefinitenes. It said:

> "Reasonable certainty is a prime requisite in a statute and its absence invalidates the statute. The rule is of greater insistence when, as here, a criminal prosecution is involved".

Petitioners submit that a statute imposing criminal penalties should be spelled out in sufficient detail to be clear, forthright, and definite.

CONCLUSION.

The questions presented are thus substantial and of great public importance, in view of the fact that the case is one of first impression under the Federal Denture Act. The Circuit Court of Appeals apparently failed to perceive the importance of the constitutional issues raised and ignored them completely.

Respectfully submitted,

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